United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-2328

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

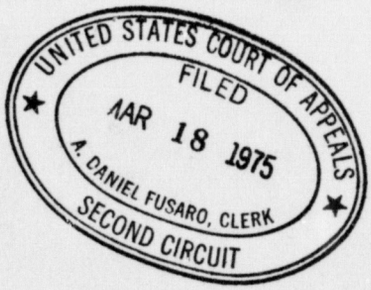
Appellee,

-against-

HARRY BERNSTEIN, * * * MELVIN CARDONA * * *, et al.,

Appellants.

BRIEF ON BEHALF OF APPELLANT
MELVIN CARDONA



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BRIEF ON BEHALF OF
APPELLANT CARDONA

Appellant Melvin Cardona was convicted of one count of conspiracy (18 U.S.C., Section 371) and seventeen counts of making false statements (18 U.S.C., Section 1010), after trial before Honorable Anthony J. Travia, U.S.D.J., and a jury. He was sentenced to concurrent two year terms on all counts and fined the sum of $17,000.00.

The Indictment

The instant indictment charged four separate types of crimes: (1) conspiracy in violation of 18 U.S.C. Section 371; (2) the making of false statements in violation of 18 U.S.C. Section 1010; (3) bribery in violation of 18 U.S.C. Section 201; and (4) the overvaluation of real

property in violation of 18 U.S.C. Section 1010.

Nine defendants were tried jointly on the 65 count indictment. Sixty-four of the counts were submitted to the jury.

Motion for a Severance

Appellant Cardona made repeated motions for severenace pursuant to Rules 8, 12 and 14 of the Federal Rules of Criminal Procedure. The first such motion was denied without prejudice on September 5, 1972, and a second such motion was denied on October 1, 1973. Additional motions to the same effect were uniformly denied.

Conspiracy Count

Count One of the indictment alleges that between March 30, 1967 and March 29, 1972, some twenty-two individuals and two corporation (a) conspired for the purpose of influencing the Federal Housing Administration by submitting false applications for mortgage insurance in violation of 18 U.S.C. Section 1010; (b) conspired to bribe officials of the Federal Housing Administration in order to induce them to increase the values of real property, and (c) conspired to procure the improper assignment, processing, review and approval of applications for mortgage

insurance submitted by the defendant Eastern Service Corporation.

The conspiracy count, which can best be described as "trinitarian" (post, pp. 19 -20), further alleges:

(I.) That it was part of the conspiracy for certain named defendants, including the appellant Cardona, to submit false and fraudulent information to the Federal Housing Administration;

(II.) That it was part of the conspiracy for the defendants Bernstein and defendant Eastern Service Corporation to procure excessive valuations on real property; to procure the expeditious handling of applications for mortgage insurance, and cause officials of the Federal Housing Administration to fail to subject such applications to proper review by bribing officials of the Federal Housing Administration;

(III.) That, finally, it was part of the conspiracy that the defendant Herbert Cronin, as Chief Underwriter at the Hempstead, New York, office of the Federal Housing Administration, would corruptly use his discretionary powers to increase the value of mortgage insurance commitments on behalf of the defendants Bernstein, defendant Eastern Service Corporation and their customers.

Substantive Counts

The indictment proceeds to charge sixty-four substantive counts, which are alleged as overt acts of the conspiracy.

The sixty-four counts include:

(a) Twenty-nine counts which charge the making of false statements (Counts 2-28; 31-32).

(b) Twenty-four counts which charge the payment of bribes (Counts 29; 33; 35-39; 41-42; 44-48; 50-51; 53; 55; 57; 59; 61-63; 65).

(c) Two counts which charge the receipt of bribes (Counts 30; 34).

(d) Eleven counts which charge that the defendant Cronin, as Chief Underwriter at the Hempstead office of the Federal Housing Administration, over-valued real estate (Counts 40; 43; 45; 47; 49; 52; 54; 56; 58; 60; 64).

Appellant Cardona is not named in any of the thirty-seven bribery and over-valuation counts. He is named, however, in seventeen of the twenty-nine false statement counts (Counts 2; 4; 5; 7; 10; 12; 14; 16-18; 20; 21; 23; 25; 27; 28; 31).

The Case Against Appellant Cardona

The case against Appellant Cardona rested entirely upon the testimony of two accomplices. The first, Ortrud Kapraki, was a cheat and a fraud of extraordinary distinction.

Prior to meeting the appellant Cardona in Brooklyn, she had operated in the Ridgewood Section of Queens. Her activities there included the sale of worthless mortgages to her fellow parishioners at a Pentecostal church, and the customers of a Ridgewood travel agency. After completion of her fraud operations against the gullible older folk at Ridgewood she moved her operation to the Sunset Park (lower Bay Ridge) section of Brooklyn, apparently in search of a new flock to fleece.

As later discussed with more particularity (post, pp. 10 -12), her criminal activities long post-dated any relationship with Appellant Cardona and, in fact, she continued to bribe Federal employees even after she had made her deal with the United States Attorneys office for absolution from all crimes, except the "Guilty" plea to one count of the indictment, in exchange for testimony against others, including Appellant Cardona.

Less is known of the background of Jose Abad, the

only other witness to incriminate the appellant Cardona. However, it is undisputed that he was an unlicensed accountant and an immigrant from Ecuador.

He was also an unindicated accomplice who, by his own declarations, had prepared many fraudulent financial statements and tax returns.

In addition to the motivations which flow from his admitted criminal activities, his immigrant status provided further basis for an extreme desire to curry favor with the prosecutor, and to avoid his wrath. Further, Abad's denials as to accounting work which he had done for a real estate company owned by the appellant Cardona, were squarely refuted by documentary evidence, consisting of cancelled checks to his order from Cardona's company.

Approaching this witness most charitably, the conclusion is inescapable that he had an extraordinarily poor memory. Less charitably, and more realistically, it could be inferred that he was a deliberate liar.

Where, as here, a case rests on such testimony, it is "weak" as a matter of law, and will be most carefully scrutinized to assure that Appellant Cardona received a fair trial.

Prior to the instant indictment, Appellant Cardona had enjoyed a good reputation in his community (18635)*.

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*References are to the transcript in the District Court unless otherwise indicated.

Statement of Facts

We adopt the statement of facts contained in the brief on behalf of the appellants Bernstein and Eastern Service Corporation. We do this not only in the interest of brevity, but also because only two witnesses, i.e., Ortrud Kapraki and Jose Abad, gave testimony involving the appellant Cardona in any of the wrongdoing alleged in the indictment.

I. Testimony of Ortrud Kapraki

A. Direct Testimony

The witness Kapraki testified that she was a real estate broker and speculator, who in May of 1967 caused the incorporation of 48th St. Realty Company, Inc. and opened a real estate office at 4305 Fifth Avenue, Brooklyn (3024-6; 3035).

She met the appellant Cardona during the summer of 1967 in connection with a real estate transaction unrelated to Eastern Service Corporation (3041-2). Kapraki told Cardona that she was having difficulties in closing residential real estate sales because of the inability of her respective purchasers to provide the down payments required in conventional mortgage transactions. Cardona told her of the modest down payments required under F.H.A.

financing, and of the services which Eastern Service Corporation, where he was employed, could render for a broker in connection with such financing (3043-5).

At Cardona's suggestion, she obtained F.H.A. appraisals on a number of properties (3046-50; 3079). Her prospective purchasers, however, were unable to meet F.H.A. requirements (3089; 3099).

She testified further that Cardona told her that these prospective purchasers whose income did not qualify them for F.H.A. mortgages, should ask relatives to act as "co-buyers" (3085-6). Further, that if such relatives were unavailable, they should find friends who would say they are "cousins" (3088). Also, that Cardona advised her as to preparation of an affidavit of savings (3225), and instructed her to prepare a fraudulent lawyer's escrow letter (3261-2).

She testified further that Cardona advised her that prospective purchasers whose incomes were inadequate to meet F.H.A. standards should seek part-time employment (3274), and that if such part-time employment proved unavailable they should find friends who would falsely certify to such part-time employment. She testified that her customers were unable to obtain such false certifications, so "I did it myself" (3275).

Kapraki testified further that Cardona assisted

her in the creation of fictitious part-time employers (3978) that Cardona counseled her to falsify the ages of applicants and their children (3541); that when problems arose as to the part-time employments of Kapraki's prospective purchasers Cardona suggested that fictitious self-employment status be created for such prospective purchasers, and that Cardona knew of one Walter Blow, who would prepare fictitious financial statements and tax returns evidencing such self-employment (3725-8; 3805). Further, that such financial statements and tax returns were obtained for prospective purchasers (3665-9; 3676; 3889-91). That such financial statements and tax returns were later obtained by Cardona from one Jose Abad (4602-4602a).

The foregoing is by no means exhaustive, but is believed to be a fair precis of Kapraki's testimony in which she implicated Cardona. Kapraki's testimony, in the words of the prosecutor, asserted that Cardona was her "guiding light" (20731) in the preparation of false personal, employment and financial data for her prospective purchasers.

B. Cross-Examination

Matters elicited on cross-examination, some of which were anticipated by the prosecutor on direct examination, compel the conclusion that the credibility of the witness Kapraki was a matter of grave doubt.

During the period from 1964 to 1967, Kapraki had been a real estate broker and speculator, operating in the Ridgewood section of Queens. As such speculator she bought and sold some fifty houses (3026-8). She devised a scheme through which she induced elderly co-parishioners at Ridgewood Pentecostal Church, to invest in worthless second and third mortgages upon shich she, Kapraki, was co-maker or guarantor (3031). The scheme came apart in December, 1966, with the consequence that she "no longer had any friends of any kind" (5734) in the Ridgewood area and "needed a new beginning" (5734).

Thereafter she formed 48th Street Realty Company, Inc., and established a place of business at 4305 Fifth Avenue, Brooklyn (ante, p. 7).

Her business relationship with the appellant Cardona extenced from August, 1967 to April, 1969, when Cardona left the employ of Eastern Service Corporation (3046-8; 5129). Kapraki continued to do business with Eastern Service Corp-

oration until some time in 1970, when Eastern Service "asked me to leave" (5925; 5583).

On August 31, 1971 Kapraki went with her attorney to the office of the prosecutor (5526), and in a matter of ten or fifteen minutes (5528) a bargain was struck under which Kapraki would plead guilty to one conspiracy count (5529).

Kapraki testified that this visit to the prosecutor's office was the occasion for a deeply moving religious experience:

> "* * * when I came to the U. S. Government's office, I -- something was revealed to me and that was, 'Ye shall know the truth and the truth shall set you free --' this has nothing to do with -- this has nothing to do with jail, it has to do with the inner part of a man -- the heart and soul that I can walk around in the joy of the Lord, which maybe few people understand." (5924).

This "revelation" at the prosecutor's office did not, apparently, have any effect upon Kapraki's worldly behavior.

Between the time of that "revelation" and the time of trial, Kapraki bribed about twenty Veterans Administration appraisers (5692). She was not indicted for these briberies and did not expect to be indicated (5693).

Further, Kapraki did not file income tax returns for the years 1971 and 1972 (5585).

Also, after her visit with the prosecutor, in 1972, she forged an attorney's name to an affidavit with respect to an escrow deposit (5584; 5940; 5693). She was not indicted for this offense (5694).

Further, after her meeting with the prosecutor, she bribed a number of New York City Housing and Building inspectors (5591); and continued to create false financial and employment information (5582-3).

II. Testimony of Jose Abad

A. Direct Testimony

The witness Jose Abad testified that Cardona came to his office in the Bronx, in March of 1969, and stated that he was looking for an accountant to do his tax return (7549-50). On a subsequent day Cardona showed Abad a sample set of financial papers, tax returns and profit and loss statements from the previous accountant, Mr. Blow. Further, that Cardona gave him a piece of paper listing the names and address of a husband and wife, their children's names, their social security numbers, a type of business and a flat figure which Cardona told him he was to show in the statements. Further, that when Abad asserted he could not prepare statements on such little data, Cardona said that Blow had been able to do so and that when Abad asserted

that this would require made-up figures, Cardona said that such had been employed by Blow, and that was the way it was to be done (7591-2). Abad testified further that he agreed and that a number of such fictitious financial statements and tax returns were prepared by him, based solely on the very sketchy information which was supplied to him by Cardona (7554-7).

On Abad's first visit to the prosecutor's office in late 1971 he was assured that he would not be prosecuted (7672). This was of special importance to him, since he was a recent immigrant from Ecuador (7706).

Abad testified that he never spoke to any of the people for whom he made up financial statements (7618). He was contradicted, however, by his Grand Jury testimony (7621).

Abad was experienced in preparing tax returns for self-employed persons in the Hispanic community. Some of these self-employed persons had "no records whatsoever" (7632). This was especially true of "gypsy cab" operators (7712). Abad would do the best he could (7626; 7691-2).

There was substantial conflict in Abad's testimony as to accounting work for Appellant Cardona's company, Mecco Properties, Inc.

Abad testified that he had been paid "always in cash" (7692) for work done for Cardona.

Further, that the only work he did for Cardona's company was to give "him some advice as to the best way to do his bookkeeping" and that this only "took about two hours" (7694).

This testimony, however, was squarely contradicted by six checks from Cardona's company to Abad dated between April 23, 1969 and September 25, 1969 (Exhs. AV, AW, AX, AY, AZ and BA), aggregating $470.00.

POINT I.

THE TRIAL IN THE DISTRICT COURT WAS INHERENTLY AND FUNDAMENTALLY UNFAIR TO THE APPELLANT CARDONA.

The trial in the District Court could not have been other than inherently and fundamentally unfair to the appellant Cardona, and "a fair trial, * * * is the foundation of our system of justice" (Gavino v. McMahon, 499 F. 2d 1191, 1196, 2d Cir., 1974). In Gavino, this Court reiterated the primacy of "fair trial" considerations over all others. It said:

> "Without minimizing the importance of the public interest in prompt disposition of criminal cases, we cannot allow our concern with calendar dispatch to triumph over a defendant's right to a fair trial, which is the foundation of our system of justice. To sacrifice a fair trial to the interest of expedition would surely undermine the true administration of justice (1196)."

In the instant case, as noted above, ante, pp. 2-3, the indictment charged four separate types of crimes: (1) conspiracy in violation of 18 U.S.C. Section 371; (2) the making of false statements in violation of 18 U.S.C. Section 1010; (3) bribery in violation of 18 U.S.C. Section 201; and (4) the overvaluation of real property in violation of 18 U.S.C. Section 1010.

Nine defendants were tried jointly on the 65

count indictment.

Sixty-four of the counts were submitted to the jury.

These sixty-four counts required a total of 147 separate determinations* of guilt or innocence.

Chronology of the Trial

(a) October 25, 1973 - Opening statements.

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(b) October 29 to November 5, 1973 - Testimony by Witnesses Hipp and Sanders as to Department of Housing and Urban Development procedures.

(c) November 5, 1973 - Witness Kapraki, ante, pp. 7-12.

(d) December 10, 1973 - Witness Valerio. The first of nine prospective purchaser witnesses. (None of these nine witnesses gave any testimony tending to incriminate the appellant Cardona).

(e) December 19, 1973 - Witness Abad (ante, pp. 12-14).

(f) January 2, 1974 - Witness Santiago, a Dun and Bradstreet employee.

(g) January 10, 1974 - Witness Winzinger, a Dun and Bradstreet employee.

(h) January 17, 1974 - Witness Aery, a Dun and Bradstreet employee.

(i) January 23, 1974 - Witness Miller, a Dun and Bradstreet employee.

(j) January 29, 1974 - Witness Fey, an officer of Eastern Service Corporation.

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*Emphasis is ours throughout.

(k) February 6, 1974 - Witness McCrann, bank officer;

(l) February 6, 1974 - Witness Goodwin, Appraiser for the Federal Housing Administration.

(m) March 12, 1974 - Witness Azzarello, Eastern Service employee.

(n) March 12, 1974 - Witness Cohen, Clerk at Federal Housing Administration.

(o) March 13, 1974 - Witness Hardiman - Department of Housing and Urban Development.

(p) March 14, 1974 - Witness Francis - Department of Housing and Urban Development.

(Defendant's Cases)

(q) April 15, 1974 - Witness Waxman (H. Bernstein)

(r) April 16, 1974 - Witness Fiori (H. Bernstein)

(s) April 16, 1974 - Witness Walsh (H. Bernstein)

(t) April 16, 1974 - Witness Fred (Eastern Service)

(u) April 18, 1974 - Witness Lehman (H. Bernstein)

(v) April 18, 1974 - Witness Fred (Eastern Service)

(w) April 23, 1974 - Witness Redding (Dun & Bradstreet)

(x) April 29, 1974 - Witnesses Mitchell, McDowell and Swaysland (Dun & Bradstreet)

(y) April 30, 1974 - Witness Dean (Dun & Bradstreet)

(z) May 1, 1974 - Witness Sparrow (Dun & Bradstreet)

(aa) May 6, 1974 - Witness Cronin (Defendant on his own behalf)

(bb) May 14, 1974 - Witnesses Mr. Monserrat, Mrs. Monserrat, Mrs. Jacobs and Mr. Sisko (F. Behar)

(cc) May 14, 1974 - Witnesses Wink, Cardona and Zaffuto (Melvin Cardona)

As to Appellant Cardona, the trial was hardly fair.

The second, and last, witness to incriminate Appellant Cardona was Abad, who completed his testimony on December 20, 1973.

However, Appellant Cardona did not have the opportunity to put in any defense until May 14, 1974, just a few days shy of five months later.

In the meantime the attention of the jury had been directed for over a month to the bribing of the witness Goodwin, a former appraiser for the Federal Housing Administration.

The jury had, in the meantime, also spent over a month hearing testimony, including expert opinion, as to the discretionary powers of the Chief Underwriter of the Hempstead office of the Federal Housing Administration to increase valuations for mortgage insurance purposes.

In these circumstances, it defies reason to contend that the appellant Cardona received a fair trial of the issues, relating primarily to the credibility of Krapaki and Abad, who had testified more than six months before the jury returned its verdict.

Wholly apart from the prejudice to the appellant Cardona, from the reams of testimony of repeated briberies (as to which no claim was made that he had any part), the sheer volume of the intervening testimony, to say nothing of the complexities inherent in the proof as to the valuation prerogatives of a chief underwriter of a Federal Housing Administration office, precluded the possibility of the requisite kind and quality of jury consideration of the relatively few issues involving him.

The So Called Single Conspiracy

Although the indictment alleged, and the proof tended to show, that different persons, at different times, committed different criminal acts, the prosecutor contended below that there was but one conspiracy. However, also, that the conspiracy had three objects or goals, i.e., (1) false statements; (2) briberies; and (3) improper exercises by the Chief Underwriter of his valuation prerogatives.

It defies logic to characterize the foregoing as a "single conspiracy".

How "three" can be "one" and vice versa, has long been of concern to theologians. As stated in Theissen, Introductory Lectures in Systematic Theology, p. 136 (Eerdmans, 1949):

"The doctrine of the Trinity is, we grant, a great mystery."

But there is no need to bring this "mystery" into the law.

In law, the crucial element of conspiracy is the act of agreement. United States v. Borelli, 336 F. 2d 376, 384-85 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965):

> "There has been a tendency in such cases 'to deal with the crime of conspiracy as though it were a group /of men/ rather than an act' of agreement. See 72 Harv. L. Rev. at 934 ... /T/he gist of the offense remains the agreement."

In the instant case the proof demonstrated multiple conspiracies and not a single conspiracy as that term is defined by Kotteakos v. United States, 328 U.S. 750 (1945) as amplified by Blumenthal v. United States, 332 U.S. 539 (1947).

Blumenthal emphasises that for there to be a "single conspiracy" where a "larger common plan" exists, there must be a "knowledge of its essential features" and a "common single goal." (332 U.S. at p. 550.)

Here, there was no proof of any "common goal" and no claim that Appellant Cardona had any knowledge of the briberies or over-valuations, whether they be described as "essential features" or as "goals".

The observation of Mr. Justice Jackson, in his concurring opinion in Krulewitch v. United States, 336 U.S. 440, 457 (1948), is appropriate:

> "* * * And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

In Grunewald v. United States, 353 U. S. 391, 404 (1956), Mr. Justice Harlan wrote:

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not again be detailed."

This case represents further drift in "the long evolution of that elastic, sprawling and pervasive offense" of conspiracy. (See also United States v. Peoni, 100 F. 2d 401, 403; 2d. Cir., 1938).

Finally, the reasons also set forth in United States v. Branker, 395 F. 2d 881, 887-9, (2d Cir., 1968), compel the conclusion that the prejudice here was so great that, even if this Court should hold that a "single conspiracy" was proved, Appellant Cardona, none the less should be granted a new trial.

POINT II.

THE SUBSTANTIVE COUNTS OF THE INDICTMENT, IN WHICH APPELLANT CARDONA IS NAMED, DO NOT CHARGE A CRIME.

A.

The Indictment Contains No Allegations Identifying the Statements Alleged to be False.

Appellant Cardona is charged in the redacted indictment with seventeen substantive violations of 18 U.S.C. Section 1010. The form of the count is identical in each instance, differing only in the date on or about which it is alleged the offense was committed and the location of the property. As an example, Count 2 of the redacted indictment reads as follows:

> "On or about the 27th day of November, 1968, within the Eastern District of New York, the defendants * * * MELVIN CARDONA * * *, for the purpose of incluencing the Federal Housing Administration of the Department of Housing and Urban Development to insure a loan and advance of credit * * * did knowingly make, pass, utter and publish false statements in an application for mortgage insurance on property located at 440 41st Street, Brooklyn, New York. (Title 18, United States Code, §1010 and §2.)"

The operative language of each count reads simply that Appellant Cardona "* * * did knowingly make, pass, utter

and publish false statements in an application for mortgage insurance * * *."

None of the substantive counts specifies the statements alleged to be false. None of the substantive counts alleges that the offense was committed wilfully.

It is fundamental that the indictment must charge a crime on its face without reference to any other documents. These requirements of the specificity and particularity which an indictment must possess are long established. United States v. Wills, 32 U.S. (7 Pet.) 138, 142 (1883); Russell v. United States, 369 U.S. 749, 763 (1962).

These criteria arise directly from the Fifth Amendment guarantee of indictment by Grand Jury and the Sixth Amendment guarantee that "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; * * *." They appear in the statutory requirement of Rule 7(c), Fed. R. Crim. P. that: "The indictment * * * shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

The Fifth Amendment states that "No person shall be held to answer for a . . . crime, unless upon a presentment or indictment of a Grand Jury." Thus, only the Grand

Jury (and not the prosecutor) has the power to charge a felony. The assurance that this constitutional requirement has been met can be provided only by an indictment that, on its face and unaided by any allegations in a bill of particulars, charges a particular crime. The indictment represents the charge found by the Grand Jury and that charge may not be amended or varied by the prosecutor. Stirone v. United States, 361 U.S. 212 (1960). As the Supreme Court has said, in Russell v. United States, ante:

> "To allow the prosecutor, or the court to make a subsequent guess as to what was in the minds of the grand jury at the time they rendered the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." 369 U.S. at 770.

Both of these constitutional guarantees as elaborated in court decisions seek to prevent the possibility that an indictment could be "open-ended" so as to allow the prosecutor subsequently to pick and choose what he (rather than the Grand Jury) believes should constitute the charge against the defendant.

The requirement of specificity of indictments is intended to prevent the prosecution from changing or altering those charges for to do so would violate the defendant's constitutional rights under the Fifth Amendment.

In this case, neither the language of the indictment nor the nature of the Grand Jury presentation permit a determination of the particular crime for which the Grand Jury found probable cause. As a result, the prosecutor was able to change the dimensions and contours of alleged crimes (which should have been found by the Grand Jury) at his will or to conform to the nature of the proof he, subsequently, determined to offer at trial.

The Supreme Court's criticism in Russell v. United States, ante, could be applied to this case:

> "At every stage in the ensuing criminal proceeding /the defendant in question/ was met with a different theory, or by no theory at all, as to what the topic had been. Far from informing /him/ of the nature of the accusation against him, the indictment instead left the prosecution free to roam at large -- to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." 369 U.S. at 768.

The record here shows repeated shifting guesses on the part of the prosecutor "as to what was in the minds of the grand jury" (Russell v. United States, ante.)

In the "Amendments to Government's Bill of Particulars" filed on October 12, 1973, three days before trial was to commence, the Government purported to add to, subtract from, and change the statements alleged to be false in sixteen counts. The counts affected were as follows:

Counts*	Redacted Indictment Count	Mortgagor
6-7	Severed	Sheltry Holmes
10-11	10-11	Fidael Rodriquez
14-15	Severed	Nilda Rosa Ortiz
16-17	Severed	Miguel Cesario
18-19	23-24	Francisco Rivera
22-23	Severed	Ignidio Valeric
24-25	Severed	Enrique Perez
28-29	Severed	Raimundo Garcia

Four of the "amendments" deleted assertions of false statements previously made. These related to Counts 6-7, 16-17 and 22-23.

With respect to former Counts 18-19 (Counts 23-24 of the redacted indictment), the Government purported to substitute an allegation of falsity relating to "Length of employment" for the previous allegations of falsity relating to "Position held" and "Full-time employment. The Government's "amendments" also instructed Appellant Cardona to "Delete" certain contentions from the original bill, with the result that there was presumably no longer any contention that there was a false statement concerning the position Mr. Rivera held or that he held this position on a full-time basis. For these, the prosecu-

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*The Amendments to the Bill of Particulars utilized the numbering of the counts contained in the original superseding indictment. The redacted indictment was not filed until October 15, 1973.

tion substituted, three days before the trial was to begin, and seventeen months after the return of the superseding indictment, an allegation that there was a false statement with respect to the length of time Mr. Rivera was employed.

There are three other instances in the amended bill of particulars which demonstrate the method utilized by the prosecution (rather than the Grand Jury) in determining which statements, in their final pre-trial view, formed the basis of the charges made in the indictment. These relate to former Counts 14-15 (Nilda Rosa Ortiz), Counts 24-25 (Enrique Perez) and Counts 28-29 (Raimundo Garcia).*

The prosecutor by the substitution and addition, repeatedly, altered the contents of the original allegations of falsity. Were the specifications of falsity contained in the indictment (as we submit they should have been), such an amendment would not have been permitted. Stirone v. United States, 361 U.S. 212 (1960); Ex parte Bain, 121 U.S. 1 (1887).

The Government sought to justify the defective indictment by urging that all that is required is that a count of the indictment track the language of the statute, citing United States v. Leach, 427 F. 2d 1107 (1st Cir. 1970). More-

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*These counts were severed (but not dismissed) on October 15, 1973. However, testimony with respect to each of them was introduced by the Government at the trial. (Tr. 3601 et seq. (Garcia 4907-48, 7148 et seq. (Ortiz).

over, the indictment in the Leach case did contain an allegation of the specific statements alleged to be false (as did all the other cases we have found).

Where a paraphrase of the statutory language would also adequately allege the requisite essential facts, that language is sufficient. It is not, however, sufficient where, either because of the nature of the crime charged or the nature of the Grand Jury presentation, more is required than merely a paraphrase of the statutory language. Russell v. United States, 369 U.S. 749 (1962); Standard Oil Co. of Texas v. United States, 307 F. 2d 120, 130 (5th Cir. 1962); United States v. Lattimore, 215 F. 2d 847, 850 (D.C. Cir. 1964); United States v. Panzarecchia, 421 F. 2d 440 (5th Cir. 1970), cert. denied, 404 U.S. 966 (1971). The issue is always whether the essential facts constituting the offense have been charged as required by the Fifth and Sixth Amendments to the Constitution and Rule 7(c) Fed. R. Crim. P.

In this case, it is not possible to determine which of the hundreds of factual statements at least twelve of the members of the Grand Jury agreed should be the basis of the charges made in the indictment.

Still another effect follows from the defective indictment, which necessitates dismissal. Not only can an (unconstitutional) variance of the trial jury's findings from

the Grand Jury's findings occur, but there is no way the Court can ensure this did not occur. Because the indictment does not identify any of the statements alleged by the Grand Jury to be false, but only states that some unidentified false statements appeared in reports, the record of whatever the Grand Jury found to be false has been forever lost. It is in fact now impossible to determine which of such statements was alleged by the Grand Jury to be false. From this it follows not only that it is impossible to say that the trial jury found unanimously that the same statements were false that the Grand Jury charged, but it is impossible to ensure any other result.

We have been unable to find any reported case which has sustained against challenge an indictment charging false statements which has not contained a specification of the statements alleged to be false. At the same time, the authorities requiring such specification are abundant. See, e.g., United States v. Borland, 309 F. Supp. 280, 287-89 (D. Del. 1970); United States v. Devine's Milk Laboratories, 179 F. Supp. 799 (D. Mass. 1960). The counts of the present indictment utterly fail to meet the standards of specificity enumerated in United States v. Tremont, 429 F. 2d 1166, 1167 n. 1 (1st Cir.), cert. denied, 400 U.S. 831 (1970) and Gevinson v. United States, 358 F. 2d 761, 763 n. 3 (5th Cir.) cert. denied, 385 U.S. 823 (1966).

Indeed, the substantive counts charged against Appellant Cardona are not in accord with the forms and guidelines of the Department of Justice for charging violations of 18 U.S.C. Section 1010 and other false statement offenses. In its handbook, Guides for Drafting Indictments, the Criminal Division of the Department of Justice sets forth form indictments charging false statements under various statutes, all of which identify the statements alleged to be false. The cases fully support this position of the Department of Justice, that an indictment alleging the submission of false statements must set forth with particularity the statements alleged to be false. United States v. Leach, 227 F. 2d 1107 (1st Cir.), cert. denied 400 U.S. 829 (1970); United States v. Tremont, 429 F. 2d 1166 (1st Cir. 1970) cert. denied 400 U.S. 831 (1970).

B.

The Substantive Counts of the Indictment Fail to Allege That Appellant Cardona Made False Statements Knowing Them to be False.

18 U.S.C. Section 1010 renders it criminal to make, pass, utter, or publish a false statement "knowing the same to be false". The substantive counts against Appellant Cardona do not charge the essential element of knowledge that

the statements were false, but allege, in each instance, merely that Appellant Cardona and others knowingly made statements (which the Government alleges to have been false, but not false to the knowledge of Appellant Cardona). Each count alleges that Appellant Cardona and others "did knowingly make, pass, utter and publish false statements . . .". Accordingly, the indictment counts fail to allege violations of Section 1010 and should be dismissed.

In United States v. Berlin, 472 F. 2d 1002 (2d Cir. 1973), this Court reversed convictions of Section 1010 and directed dismissal of counts under Section 1010 for failure of the indictment to allege that the defendant knew of the falsity of the statements he submitted. The court stated:

> "Appellant's third contention, that all counts of the indictment were deficient and failed to state a crime, is more troubling. At the close of the government's case, appellant moved to dismiss the indictment. Counts One and Two concerned violations of 18 U.S.C. §1010 and Counts Three and Four concerned violations of 18 U.S.C. §1014. An essential element of a violation of either statutory provision is that the offender had knowledge of the falsity of the statement that was made."
>
> * * *
>
> "The government argues that, since the counts charged that Berline 'counseled and caused' Oswald to submit the false statements, the term 'counsel' implies knowledge of the falsity of the statements. With this argument we cannot agree. One can counsel and cause

another to utter a statement that one only later learns to be untrue. (1007)"

Concerning the Government's contention, in the District Court, that it was sufficient for the counts in question to cite the statute, this Court further observed:

"This deficiency was not cured by the fact that each count cited the statute that appellant is alleged to have violated. Although the statutes in question explicitly require knowledge of the falsity, if this were enough to cure a deficient statement, then almost no indictment would be vulnerable to attack; for it is a common practice in indictments to cite the statute that is alleged to have been violated. We have been cited to no authority indicating that an indictment can be cured in such a fashion. Indeed, the cases, while not discussing the point explicitly, seem to imply that an indictment that fails to allege all the elements of the offense required by the statute will not be saved by simply citing the statutory section. /Citations/ (1008).

Perjury is a crime analogous to the preparation and submission of false statements proscribed by 18 U.S.C. Section 1010, and cases on Rule 7(c) requirements in perjury indictments establish that the count alleging perjury must set forth the false testimony. See, e.g.: Sharron v. United States, 11 F. 2d 689 (2d Cir. 1926); United States v. Otto, 54 F. 2d 277, 278 (2d Cir. 1931) ("an allegation of the testimony given, accompanied by an al-

legation that it was false, is sufficient . . . ."); United States v. Hiss, 185 F. 2d 822 (2d Cir. 1950), cert. denied, 340 U.S. 948 (1951); United States v. Goldenberg, 276 F. Supp. 898, 900 (S.D.N.Y. 1967) (Tenney, J.) ("In a perjury case, the Government is required to set forth only the allegedly false statements and not what the truth was."); United States v. Laut, 17 F.R.D. 31, 33 (S.D.N.Y. 1955).

Very much in point is United States v. Simplot, 192 F. Supp. 734 (D. Utah 1961), cited with approval in Russell v. United States, 369 U.S. 749, 766 n. 13 (1962), a case involving a perjury charge, where the court stated that:

> " . . . an indictment for perjury substabtuakkt ub tge terns if the statute without specification to some extent of the testimony alleged to have been false does not contain a plain, concise, and definite statement of the offense charged as required by /Rule 7(c)7 of the Rules of Criminal Procedure, and does not, acceptably to the Constitution, inform the defendant of the nature and cause of the accusation against him." 192 F. Supp. at 737.

Accordingly, we respectfully urge that, based upon all the authorities, the substantive counts of the indictment in which Appellant Cardona is named, do not charge a crime.

POINT III.

THE CONVICTION OF THE APPELLANT CARDONA WAS BASED ENTIRELY ON THE TESTIMONY OF ACCOMPLICES. IT SHOULD NOT BE PERMITTED TO STAND.

We respectfully urge this Court to reconsider its prior rulings that a guilty verdict may rest upon the uncorroborated testimony of accomplices, in the light of its decision in United States v. Taylor, 464 F. 2d, 240 (1972).

In Taylor, this Court held that a higher quantum of proof was required in a criminal case than in a civil case to permit submission to a jury.

We now ask this Court to hold that such uncorroborated testimony of accomplices is insufficent to enable a jury "fairly /to/ conclude guilt beyond a reasonable doubt". (Taylor, ante, p. 245).

We recognize that this Court, by way of dictum, reaffirmed its rule as to accomplice testimony in United States v. Messina, 481 F. 2d 878, 881 (1973). However, in Messina the Court found highly incriminating testimony by a witness other than an accomplice.

No such corroborating testimony is present, as to Appellant Cardona, in the instant case. Accordingly, the question is squarely presented.

POINT IV.

THE CONDUCT OF THE TRIAL JUDGE FURTHER DEPRIVED APPELLANT CARDONA OF A FAIR TRIAL.

The conduct of the trial judge deprived the appellant Cardona of a fair trial within the guidelines set out by this Court in United States v. Nazzaro, 472 F. 2d 302 (1973). There, this Court said:

> "Where the defendant's guilt or innocence rests almost exclusively on the jury's evaluation of the witnesses' demeanor and credibility, we cannot ignore questioning undertaken by a judge which so clearly signals to the jury the judge's partisanship. Even if a judge's interjections are not motivated by a partisan purpose, 'he must not . . . permit even the appearance of such an inference.' United States v. Curcio, 279 F. 2d 681, 682 (2nd Cir. 1960).
>
> * * * * *
>
> * * * Certainly a trial judge must be something more than a useless appendage to the trial. He bears the responsibility of insuring that the facts in each case are presented to the jury in a clear and straightforward manner. Yet an appearance of impartiality and judicious detachment must prevail at all times."

In the instant case, it is clear that the "appearance of impartiality and judicious detachment" was wholly absent on many occasions and such absence was highly prejudicial to the defendant Cardona.

Here, Appellant Cardona's "guilt or innocence rest/ed/ almost exclusively on the jury's evaluation of Ortrud

Kapraki's demeanor and credibility". (United States v. Nazzaro, ante). Furthermore, common sense indicates that in a trial of such extraordinary duration, the judge's partisanship was bound to have a singularly prejudicial effect upon the jury.

Considerations of brevity preclude a presentation of all instances of prejudicial behavior during this trial of unprecedented length and complexity. There were however many such occasions, including not only undue interference with and denigration of counsel (5209; 5443; 6061; 6325; 6380) but outright distortion and misstatement of the testimony (5501).

The Court's attention is particularly directed to an extended incident very near the conclusion of the lengthy trial at which the partisanship of the trial judge was made very clear to the jury. Appellant Cardona called his wife, Mrs. Cecilia Cardona, as a witness on his behalf (18562). At side bar, his attorney made an offer of proof with respect to a day in August, 1971 when an F.B.I. agent came to the Cardona's home. Appellant Cardona shortly thereafter telephoned Mrs. Kapraki, who came to their home and had a conversation with Appellant Cardona which the witness overheard (18588-9). The Court ruled that the conversation would be allowed (18593).

However, as will plainly appear from the following extract from the testimony, the witness was not permitted to give her testimony but was immediately the subject of wholly unfair and even vicious cross-examination by the trial judge, as follows (18594-18602):

"(The trial then proceeded within the hearing of the jury:)

DIRECT EXAMINATION

BY MR. KLEIN: (continued)

Q Did there come a time, Mrs. Cardona, when Ortrud Kapraki came to your home?

A Yes.

Q Following this episode that we have been talking about?

A Yes, the same day that Agent Sniegocki went to my house, my husband called her.

THE COURT: Who called her?

THE WITNESS: My husband.

THE COURT: Your husband called her?

THE WITNESS: Yes, your Honor.

THE COURT: That day she came to your house?

THE WITNESS: She came the same night.

THE COURT: What day was that?

THE WITNESS: That was also August of 1971.

THE COURT: August of 1971?

THE WITNESS: Yes.

THE COURT: You don't know the day?

THE WITNESS: She came -- she came three or four times more --

THE COURT: The first time?

THE WITNESS: The first time, the first time I met her was in her office, --

THE COURT: That is right, and we are talking now about the day that Mr. Sniegocki came to your house.

THE WITNESS: Yes, sir.

THE COURT: That day you say she came to your house, too, that night?

THE WITNESS: Yes, but she has been in my house before.

THE COURT: I didn't ask you that, I just asked that is the day that your husband called her?

THE WITNESS: Yes, your Honor.

THE COURT: Right.

THE WITNESS: Yes.

THE COURT: What day was that, what day was it that Mr. Sniegocki came?

THE WITNESS: He came in August of 1971.

THE COURT: You don't know the day?

THE WITNESS: I can't remember the exact date.

* * *

Q What, if anything else happened during that conversation?

A My husband keep asking her to please to talk to the FBI and to do it without her lawyer and they kept --

THE COURT: To do it, what?

THE WITNESS: Without her lawyer.

THE COURT: Whose lawyer?

THE WITNESS: Kapraki's lawyer.

THE COURT: In other words, your husband was telling her what to do without his lawyer?

THE WITNESS: Without her lawyer.

THE COURT: Without her lawyer?

THE WITNESS: According to the conversation that my husband had with Agent Sniegocki.

THE COURT: He wanted Mrs. Kapraki to tell Agent Sniegocki what your husband told Sniegocki, is that what you mean?

THE WITNESS: Excuse me?

THE COURT: Did you say you heard your husband say something to Mrs. Kapraki --

THE WITNESS; Yes, your Honor.

THE COURT: You tell me again, in your own words, what exactly your husband said to Mrs. Kapraki. I want to hear it in your own words.

THE WITNESS: All right.

THE COURT: Exactly, and speak up loud because I want everybody to hear.

THE WITNESS; My husband asked Ortrud Kapraki, in his own words he said, 'Please, Ortrud, if you have done something wrong, it's better that you talk to the FBI by yourself, because this way you will feel better.'

THE COURT: What about the lawyer, when did that come in?

You said something about a lawyer.

THE WITNESS: Then my husband said to her, 'And please do it without your lawyer.'

THE COURT: Then you said something in accordance with --

THE WITNESS: Because --

THE COURT: Did you say that?

THE WITNESS: Yes.

THE COURT: Your husband said, 'In accordance with my conversation (sic)'

THE WITNESS: You want me to re;eat it?

THE COURT: Yes.

THE WITNESS: Yes, you want me to repeat the conversation with my husband, with Sniegocki --

THE COURT: You are talking about the conversation, and I want to hear the whole conversation, not only parts of it.

THE WITNESS: All right.

When Agent Sniegocki left that afternoon my house --

THE COURT: I'm only interested right now in the conversation between Mrs. Kapraki, your husband and you in your livingroom or parlor, as you call it.

THE WITNESS: Yes.

THE COURT: That afternoon, Sniegocki wasn't there, was he?

THE WITNESS: In the evening, no.

THE COURT: No? All right.

Now that is the conversation you are talking about?

THE WITNESS: Yes, Your Honor.

THE COURT: All right.

Now tell us exactly what your husband said.

THE WITNESS: All right.

He -- He said to Ortrud Kapraki that it was better for her -- It was -- It was better for her to confess to the FBI without her lawyer.

THE COURT: Without her lawyer?

THE WITNESS: Yes.

THE COURT: What else?

* * *

THE COURT: You said earlier something about, He told her something about the FBI, something in accordance with the way I talked to him, what did you mean by that?

THE WITNESS: According to what the Agent Sneigocki asked to my husband.

THE COURT: No, no.

MR. KLEIN: I submit, your Honor, that is an answer.

THE WITNESS: Yes, your Honor.

THE COURT: Say that again.

THE WITNESS: According to what Agent Sneigocki have asked from my husband.

THE COURT: That is what your husband told her?

THE WITNESS: Yes.

THE COURT: You may proceed, Mr. Klein.

MR. KLEIN: May I proceed?

THE COURT: Yes.

* * * "

Shortly after the testimony set forth above, the learned trial judge launched a diatribe against defense counsel in the presence of the jury (18622-5).

"(The following conference took place at the bench between the Court and counsel.)

* * *

MR. SOVIERO: I don't know if your Honor is aware, but as all of the defense witnesses have testified this morning, your Honor, by facial expressions --

THE COURT: Now, Mr. Soviero, I want you to stop right there.

MR. SOVIERO: No. I am not going to stop.

THE COURT: Well, you are going to wait until I have got something to say. That is the most insulting thing that you have done so far in this case because you know darn well that that is not so. It is just a terrible thing. I have purposely, the last several days, turned my chair, since Mr. Martine got excited about what I did with Mr. Cronin -- I have purposely made it my business not to even breathe. And when I have coughed, I have put my hand up. And if you are going to start finding ways -- you are not going to tell me how to sit on the bench, whether I should put my hand towards my cheek, or whether I should put my hand under my chin, or whether I should sit with my legs crossed.

MR. BRODSKY: This is not a side bar any longer.

MR. SOVIERO: May the record indicate that your Honor is making the statement in front of the jury.

THE COURT: Yes.

MR. SOVIERO: Let's do it in front of the jury and we will both be heard in front of the jury.

THE COURT: Mr. Soviero, one more shot for you.

MR. SOVIERO: I am sorry, sir, I cannot stop now. I cannot stop. Your Honor desires to give me a shot, give me the shot.

THE COURT: You are liable to get it faster than you think.

MR. SOVIERO: If your Honor please, I cannot

stop. I have a duty in this court to sp ak up.

THE COURT: Well, speak up side bar. I will let you speak to your heart's content.

MR. SOVIERO: Side bar?

THE COURT: Side bar.

MR. SOVIERO: It is no longer a side bar. This is in the presence of the jury. The jury is going to lunch anyway, if it please the Court and we can do it in court.

THE COURT: You will be going too. No, if you have got something to say side bar, say it side bar."

The foregoing was apparently too much even for the prosecutor, Mr. Bashian (who had been previously referred to by the trial judge in the presence of the jury as "George"; 6973).

The prosecutor said (18624):

"MR. BASHIAN: Can you possibly excuse the jury?

THE COURT: No.

Do you have something to say side bar -- really side bar -- between now and 1 o'clock?

MR. SOVIERO: Yes, I do, your Honor.

THE COURT: Please say it.

MR. SOVIERO: As I started to say before this became a non-side bar, your Honor has been making facial expressions all day indicating disbelief, indicating doubt, indicating incredulity of the testimony of the various witnesses. Your Honor has done this continually when the defense has presented its case.

I have noted it, if it please the Court, and I am observing your Honor.

Your Honor has also taken up the questioning with this last witness in a way and in a manner that

would intend to seem that you are cross examining her. That you indicated you did not believe what she was saying. That you were trying to get to the point that she heard her husband say that he told Ortrud Kapraki that Ortrud Kapraki's story should gibe with his story to the FBI.

And she didn't say that at all. But that is what your Honor tried to elicit from her.

Now, I object to this and I think it reflects on the whole defense.

And I further move for the withdrawal of a juror and the declaration of a mistrial for your Honor's repeated conduct and diatribes toward me in front of this jury, the last one of which was entirely unnecessary, because we were at side bar.

* * *"

Not only was counsel entirely correct in his observations:

(a) that the trial judge was "cross-examining her";

(b) that the trial judge indicated that he "did not believe what she was saying";

(c) that the trial judge was trying to get her to say that her husband told Kapraki that she should tell a story to the FBI which would jibe with the statement of Appellant Cardona.

But, also beyond all this, (d) the trial judge attempted to badger the witness into saying that her husband told Kapraki to see the FBI without his (Cardona's) lawyer, where, in fact, the witness had tried to say three times that

her husband urged Kapraki to see the FBI without her (Kapraki's) lawyer (ante, pp. 38-39).

The foregoing conduct by the trial judge is so squarely contrary to the guidelines mandated by this Court in United States, v. Nazzaro, ante, p.35, as to require no further comment. Occurring, as it did, at the end of the trial, it could not have been other than extremely prejudicial.

CONCLUSION

THE INDICTMENT SHOULD BE DISMISSED AS TO APPELLANT CARDONA, OR, IN ANY EVENT, A NEW TRIAL GRANTED.

New York, N.Y.
March 17, 1975

Respectfully submitted,

JOHN A. KISER,
Attorney for Appellant
Melvin Cardona

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

KATHERINE C. FOLEY, being duly sworn, deposes and says: I am over the age of twenty-one years and am employed in the office of John A. Kiser, attorney for the appellant Melvin Cardona.

On March 18, 1975, I served the annexed Brief on behalf of Appellant Melvin Cardona on each of the following attorneys by depositing same at the United States Post Office, Bryant Park Station, on West 43rd Street, New York, New York, enclosed in securely closed, postpaid envelopes, and addressed to them at the addresses given below, those being the addresses appearing on papers heretofore served by them in these proceedings:

Frank G. Raichle, Esq.,
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(Attorney for United States of
America, Appellee).

Sworn to before me this
18th day of March, 1975.

JOHN A. KISER
Notary Public, State of New York
No. 31-7282200
Qualified in New York County
Commission Expires March 30, 1976

Katherine C. Foley

Copy Received
March 18, 1975
Henry J Bailey
Attorney for Appellant Behan